Petition

81-1789

No.: _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1981

EDWARD M. GILBERT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

I. When Defendant has presented colorable allegations of evidential suppression by the prosecution, is he entitled to an evidentiary hearing at which his substantial claims can be tested by the traditional tools of the adversary process?

II. When the proper new trial standards cannot be determined without an evidentiary hearing, can Defendant's new trial motion legally be dismissed in the absence of such a hearing?

III. Do Defendant's pre-trial request, his persistent demands throughout the trial itself, and numerous cross-examination questions constitute a specific request for suppressed evidence under *Brady v. Maryland*?

IV. Is a civil consent decree signed by Defendant in a wholly unrelated case admissible under Federal Rule of Evidence 404(b), which applies only to crimes, wrongs or acts which are related to the case at hand?

V. Is a 17-year-old prior conviction characterized by judicially recognized special circumstances admissible under Federal Rule of Evidence 609?

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Opinion Below

The opinion of the Court of Appeals for the Second Circuit appears as Appendix A.

Jurisdiction

This is a timely petition for certiorari to the United States Court of Appeals for the Second Circuit from decisions rendered on December 11, 1981 and January 29, 1982. Jurisdiction is conferred by 28 U.S.C. § 1254.

Constitutional and Statutory Provisions Involved

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law . . ."

Rule 410 of the Federal Rules of Evidence provides, in pertinent part:

> "Except as otherwise provided in this rule, evidence of the following is not, in a civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussion . . . (2) A plea of nolo contendere . . ."

Federal Rule of Evidence 404(b) provides, in pertinent part:

> "Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident."

Federal Rule of Evidence 609(b) states:

> "Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect."

Statement of the Case

I. Introduction

The record in this case strongly suggests that the Government – in cooperation with two former United States Attorneys – contrived to withhold evidence essential to Defendant's case.

The charade they employed was as follows: During Defendant's trial, the Chief of the Criminal Division at the United States Attorney's Office received a telephone call from a former Assistant United States Attorney, requesting a meeting concerning "matters which could affect individuals represented by him" and another former Assistant United States Attorney. At the meeting, the former Assistant United States Attorney informed the current Chief of the Criminal Division that he had information regarding one of the Government's cooperating witnesses, but "preferred to wait a few days before disclosing the name of the individual." Not coincidentally, the day they chose for their disclosure was the very day on which the jury rendered its guilty verdict against Gilbert. At this time, the former Assistant informed the Chief that the key Government witness against Defendant was implicated in serious criminal activity. On the following day, this information was relayed to the Government attorneys who were handling the Defendant's prosecution. Notably, however, no attempt was made to convey the information to Defendant's counsel until long after the seven-day period for a new trial motion under more lenient standards had elapsed. In a subsequent letter, the Government stated that an investigation of its key witness had revealed a history of extensive fraud and deceit.

When this information was subsequently disclosed at the trial of Defendant's co-defendants, the result was acquittal, thus demonstrating the importance of this impeaching evidence.

The Court of Appeals' legitimation of this prosecutorial charade strikes at the very heart of Defendant's

ability to safeguard his basic constitutional rights by exploring substantial allegations of Government misconduct. Indeed, all Defendant requests is an evidentiary hearing at which the Government's suspicious behavior can be tested by the truth-testing tools of the adversary process.

Defendant was convicted primarily on the basis of testimony by a co-conspirator named James Couri. Couri was presented to the jury as an honest, unbiased, and consistent witness. (Gilbert Transcript, hereafter T 5228.) The trial court recognized that Couri's credibility was the "central issue" (T 4473).

Unbeknownst to the jury, however, Couri was a "crook," a chronic liar, a "criminal," and a man with "problems." These are not Defendant's characterizations; they are the Government's at a trial held two months later. (Revson Transcript, hereafter RT 7032, 7040-42.)

Precisely when the Government learned the truth about Couri is hotly disputed. Throughout this entire appeal, all Defendant has requested is an evidentiary hearing to explore first, whether the Government knew about Couri prior to trial and second, whether the Government should have disclosed the truth during trial. Defendant's allegations find substantial support in the facts already discovered. For example, the Government admits that before the end of Defendant's trial two former Assistant United States Attorneys, who maintain close connection to the office, apprised the head of the Criminal Division that they possessed crucial incriminating evidence concerning an important Government witness who had recently testified. The Government also concedes that it learned within hours of the end of the trial that Couri was the mystery witness. Yet Defendant's counsel was not so informed until well after the seven-day limitation on new trial motions had expired. In short, the circumstances surrounding

these staged disclosures are shrouded in mystery. Although it seems likely that the Government has something to hide, the truth will never be unearthed without an evidentiary hearing.

The seriousness of Defendant's allegations is underscored by the subsequent trial of his two co-defendants. The trial was, with one striking exception, a rerun of Defendant's trial: same indictment, same prosecutor, same legal theory, same witness and documents. The striking exception, of course, was that the second jury learned the "whole truth" about Couri. The jury, fully informed of the facts concerning Couri's credibility, acquitted both co-defendants on all counts.

These two trials came as close as humanly possible to a flawless natural experiment on the significance of the new evidence. This natural experiment conclusively demonstrates that Defendant is entitled to a new trial under any possible standard. Moreover, if an evidentiary hearing establishes Defendant's colorable allegations of prosecutorial suppression, the materiality standard of *United States v. Agurs*, 427 U.S. 97 (1976), certainly requires a new trial. Indeed, the trial court conceded that the newly discovered evidence was quite material. Finally, because Defendant's new trial motion should be taken as having been filed within seven days of the verdict, his motion should be evaluated under the more lenient "interests of justice" standard.

The crucial point, however, is that the appropriate new trial standard cannot be determined unless Defendant's allegations are fully explored at an evidentiary hearing. At the very least, Defendant is entitled to such a hearing.

In addition to these new trial matters, Defendant raises two additional arguments. First, the admission of a consent decree entered into by Defendant with the S.E.C. in an unrelated case was improper and requires a new trial. Second, the trial court erred in ruling that a 17-year-old conviction would be admissible for impeachment purposes should Defendant testify.

II. Facts

On February 25, 1981, before the Honorable Charles Haight of the Southern District of New York, Defendant was convicted of conspiracy to manipulate securities trading and of various substantive violations of the securities laws. He was sentenced to a four-year prison term. On July 23, 1981, Judge Haight denied Defendant's motion for a new trial and an evidentiary hearing. On December 11, 1981, a panel of the Court of Appeals affirmed Defendant's conviction. A petition for rehearing was denied on January 29, 1982.

Defendant, John Revson and Ludwig Cserhat were jointly indicted on August 19, 1980. Revson and Cserhat then had their trials severed from that of Gilbert. At Defendant's trial, the Government relied principally on the testimony of James Couri. While the trial judge accurately noted that "credibility is a central issue" (T 4473), he surprisingly cut off inquiry into Couri's art gallery, Plazagal International, which was being sued by its creditors. The jury was thus prevented from hearing a substantial challenge to Couri's credibility.

Five days before the jury returned its guilty verdict, Thomas Fitzpatrick, Chief of the United States Attorney's Office Criminal Division, received a telephone call from Henry Putzel, a former United States Attorney, requesting a meeting concerning "matters which could affect individuals" represented by him and Henry Korn, another former Assistant United States Attorney. At the subsequent meeting, Putzel informed Fitzpatrick that he had information regarding one of the Government's cooperating witnesses, but "preferred to wait a few days before disclosing the name of the individual." Not coincidentally, the day chosen by Putzel and Korn for their disclosure was February 25, the day on which the jury found Defendant guilty. At this time, Korn informed Fitzpatrick that Couri, the key Government witness against Defendant, was implicated in

serious criminal activity. It was not until March 20, however, that the Government informed Defendant's counsel that Couri had engaged in extensive fraud and deceit in his Plazagal ownership, including alterations of the gallery's financial records to deceive a bank into maintaining existing credit and granting additional loans.

On March 23, the Government allowed Couri to plead guilty to two counts of submitting false statements to a bank in return for his testimony at the Revson/Cserhat trial. At that trial, however, the defense attorneys were armed with the new evidence concerning Couri's credibility. Following a devastating cross-examination and the Government's sheepish admission that Couri was a chronic liar and a criminal (RT 7032, 7040-42), the jury acquitted Revson and Cserhat on all counts.

On June 9, 1981, Defendant moved for a new trial or, in the alternative, an evidentiary hearing to resolve the factual ambiguities in the Government's account of the circumstances surrounding the release of information concerning Couri. In support, Defendant's counsel, Alan Dershowitz, submitted an affidavit attesting to his conversations with Putzel. In those conversations, Putzel conceded that he had additional information that he would disclose at an evidentiary hearing. The Government produced no counter affidavits.

Defendant's motion was denied on July 23, 1981, although the court found "that, armed with such additional ammunition, Gilbert's able trial lawyer might have achieved a different result" (Opinion at 32). Defendant's appeal to the Second Circuit Court of Appeals was denied on December 11, 1981.

III. Comparison of the Two Trials

A. The Couri Evidence Presented in Both Trials.

Couri's testimony was the heart of the Government's case in both trials because *only* Couri testified as to the intent of the three defendants. Without Couri's testimony, the prosecutor's case consisted of a series of records, stock transactions and ambiguous events. As the Government acknowledged, "you can't [prosecute stock manipulation] with the records alone . . . There are always going to be some records. It is whether you can make the connections" (RT 7019). Only Couri purported to make those connections. As the trial court observed, "[c]redibility is a central issue . . . It seems to me in this case that it comes down in a very large measure to a choice between what Mr. Couri's testimony is and what Mr. Gilbert's testimony would be expected to be" (T 4473).

Couri was similarly necessary for establishing intent and purpose at the Revson-Cserhat trial. In essence, he repeated his prior testimony. A summary of the Couri testimony provided in the two trials, set out in the table below, shows this to be the case.

Summary of the Couri Testimony at the Gilbert and Revson/Cserhat Trials

Criminal Intent	*Transcript Reference*	
Testified to by Couri	*Gilbert*	*Revson/Cserhat*
Meeting to plan trading activity	1840, 1844	1646-47, 1846
Execution of deceptive cross and match sales	1974	1633
Deceptive use of multiple accounts	1422	1634
Bids calculated to "narrow the spread" between buy and sell orders	1842	1634
Backdating letters to evade SEC reporting requirements	2009, 2014	1876, 1877
Discussion to plan testimony to the SEC following the suspension of trading	2160-2161	1995

B. The Non-Couri Evidence Presented in Both Trials.

Although a significant amount of non-Couri evidence was presented at both trials, almost all of it went to the *second* element of the Government's cases: whether a pattern of dealing in Conrac stock was engineered by the defendants. None of the non-Couri evidence established the required first element: a criminal *intent* to deceive the public with this alleged pattern of dealings. By itself, then, the non-Couri evidence would be an insufficient basis for establishing Defendant's guilt.

If there was sufficient non-Couri evidence to convict Gilbert, then such evidence should also have resulted in the convictions of Revson and Cserhat. This is because the same body of evidence, and the same inferential arguments, were presented at both trials. In fact, the Government's non-Couri evidence in the Revson/Cserhat trial clearly established that those defendants were much more closely identified with certain key elements of the prosecution's case than was Couri. For instance, the documentary evidence and non-Couri testimony showed that Gilbert, Revson and Cserhat were all involved in the trading of Conrac stock. In at least two instances (specified in separate counts of the Indictment), Cserhat and Revson were more culpable than Gilbert. Yet Gilbert was found guilty on all counts. Since the non-Couri evidence implicated all three defendants equally, the only possible conclusion is that the Couri cross-examination accounts for the difference between the two trials. A summary of the important non-Couri testimony follows.

Summary of the Key Non-Couri Evidence At the Gilbert and Revson/Cserhat Trials

Pattern of Dealing in Conrac Stock	*Witness (Transcript Reference)*	
	Gilbert	*Revson/Cserhat*
Stock transactions among alleged consiprators	Asselta (T 3433-3571)	Asselta (RT 157-93, 5281-544, 5663-64, 5743)
Trades executed without account names	Cole (T 2319-24)	Cole (RT 4162-64)
	Sparks (T 3887)	Sparks (RT 4747-96)
Cross-transaction with Western International	Streicher (T 4104-13)	Streicher (RT 5750-57)
	Chiles (T 1620-26)	Chiles (RT 3304-23)
Back-dating letters to SEC	Dolce (T 1501-03)	Kraus (RT 906-08, 941-45)
	Mason (T 4409)	

C. The Couri Cross-Examination at Both Trials.

Because the Government argued that Couri's testimony provided sufficient evidence of criminal intent, the defenses at both trials found it necessary to impeach his credibility. However, Defendant's efforts were thwarted by the unavailability of evidence tying Couri to any illegal activity, while Revson and Cserhat were able to present the jury with a broad spectrum of Plazagal activities that irreparably damaged Couri's credibility.

Contrary to the assertions of the courts below, Defendant's counsel were able to do very little to impeach Couri. At most, Defendant's efforts to undermine Couri's credibility were largely comprised of raising isolated instances of contradictory testimony (T 5154-55, 5148-49). Defense attempts to develop a more general attack based on the Plazagal affair were barred by the trial court because of a lack of evidence of "misrepresentation or fraud" by Couri (T 2714).

In contrast, Revson and Cserhat bombarded witness Couri with the bribery, falsification of records, bank fraud and deception of consignors that characterized his Plazagal dealings (RT 2512-12; 2732; 2538-39; 2542; 3202). As a result, the Government was forced to concede that Couri was both a liar and a crook (RT 7021, 7032). This conclusion, drawn by the prosecutor himself, forced the Government to rely exclusively on independent corroboration. The result was the complete acquittal of both Revson and Cserhat.

In summary, the newly discovered evidence of Couri's extensive criminal conduct at Plazagal colored all of the Government's other evidence. The new evidence forced the prosecution to concede that its star witness, the key to its case, was a liar and a crook. And the evidence clearly affected the jury, making the difference between a guilty verdict for Gilbert and an acquittal for Revson and Cserhat.

Moreover, the conclusion that, in the abstract, there was sufficient non-Couri evidence to convict Defendant is totally irrelevant – in addition to being incorrect. The non-Couri evidence was not presented to Defendant's jury in the abstract. On the contrary, the Government's entire case – non-Couri evidence and all – would have been destroyed had its star witness' credibility been mortally wounded. This is exactly what occurred in the Revson/Cserhat trial. Any experienced criminal lawyer will attest that when a prosecution witness' credibility has been destroyed on cross-examination, it is far worse for the Government than if that witness had never been called in the first place. In short, these facts present the paradigm for granting a new trial motion. There is no need for this Court to speculate whether the newly discovered evidence would have resulted in a different verdict; the mirror image trials provide the most convincing possible answer to any such speculation.

Reasons for Granting the Writ

I.

At a Minimum, Defendant Is Entitled to an Evidentiary Hearing on His New Trial Motion.

The paper record in this case -- consisting of scant information provided by reluctant witnesses who have not testified under oath -- cannot begin to resolve satisfactorily the complex and substantial issues raised. Only the truth-testing tools of the adversary process -- including the subpoena, the oath and cross-examination -- can fully explore the Government's conduct in this case. Moreover, the information developed in an evidentiary hearing will be necessary to any determination of the proper standards governing new trial motions. As a matter of law, therefore, Defendant's motion for a new trial cannot be denied without such a hearing.

A. Possible Areas of Inquiry at an Evidentiary Hearing.

It is no surprise that the paper record is incapable of resolving Defendant's substantial due process and prosecutorial misconduct claims. For that record consists of self-serving denials by the Government and information provided by recalcitrant witnesses who have not been subpoenaed to testify under oath.

The conclusion of the courts below that an evidentiary hearing would not reveal relevant information is a serious distortion of both the law and the record. Most fundamentally, Defendant cannot legally be placed in the classic Catch-22 situation of being unable to fully document Government misconduct without a hearing while not being entitled to such a hearing until he proves such misconduct in the first place. Once Defendant has presented colorable allegations of misconduct -- as in the case at hand -- he is legally entitled to an evidentiary hearing. *See infra* at 17-18.

Second, one crucial witness – former United States Attorney Putzel – has already indicated that there are potentially important questions that he will not answer unless called to testify at an evidentiary hearing (Dershowitz affidavit). The same is doubtless true of other witnesses, who would prefer not to alienate the Government unless compelled to testify under oath at a hearing.

Finally, an evidentiary hearing is necessary to explore four potential areas of governmental misconduct. *First*, an evidentiary hearing is necessary to determine precisely what the Government knew or should have known about witness Couri's misconduct *before trial.* It is reasonable to assume that such issues were raised during the prosecution's lengthy pretrial preparations with Couri, yet no such information was ever revealed to Defendant.

Second, an evidentiary hearing would explore the Couri-related communications *during trial.* Throughout this entire appeal, the Government has never explained why Fitzpatrick, the Chief of the Criminal Division, did not even begin to try to identify Putzel and Korn's mystery witness until several days after the initial phone call. The Government concedes that Fitzpatrick was told that the mystery witness had "recently testified" in an important case and that his identity would be revealed "in a few days" (presumably at the trial's end). As a result, Fitzpatrick could easily have discovered the witness' identity by simply circulating a memorandum throughout the office. Only an evidentiary hearing can fully explore the reasons behind Fitzpatrick's puzzling failure.

Third, an evidentiary hearing would permit a thorough examination of the extent to which the Government is responsible, under an equitable agency theory, for the conduct of Putzel and Korn. From all appearances, Putzel and Korn delayed disclosing Couri's name so as not to obligate the Government to reveal

Couri's criminal acts while Defendant's trial was going on. Given the intimate familiarity of former Assistant United States Attorneys Putzel and Korn with the operations of the office, Defendant alleges that these attorneys were seeking to serve their client's interests by staging their disclosure so that the Government would not be faced with embarrassing information at a critical time. This sort of practice obviously cannot be sanctioned by the judiciary. Indeed, the failure of the courts below to even comment on the issue makes the equitable agency theory ripe for certiorari review by this Court.

Fourth, an evidentiary hearing would examine prosecutorial conduct *following trial.* The paper record does not even begin to explain why the Government failed to disclose the Couri information until well after the seven-day new trial motion time limitation had expired. In addition, the Government cannot be permitted to rely on the self-serving and conclusory statements contained in its belated letter to defense attorneys.

In short, only an evidentiary hearing can satisfactorily explore these four possible areas of prosecutorial misconduct. Indeed, the Government should not be opposed to such a hearing unless it is afraid that the truth will be revealed. The current unsatisfactory state of the record gives rise to a reasonable suspicion of substantial misconduct. If the Government has done no wrong, it should welcome an opportunity to have Defendant's colorable allegations fully investigated.

B. The Legal Consequences of Defendant's Factual Allegations.

The courts below have mistakenly concluded that Defendant's new trial motion can be dismissed in the absence of any evidentiary hearing. Because this finding seriously misconstrues the holdings of *United States v.*

Agurs, 427 U.S. 97 (1976) and *Brady v. Maryland*, 373 U.S. 83 (1963), Defendant's claims deserve to be reviewed by this Court.

It is well settled that prosecutorial suppression of evidence in the face of specific defense request results in a new trial "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." *United States v. Agurs*, 427 U.S. 97, 103 (1976). As the trial court concedes, the evidence involved here clearly satisfies this materiality standard. *See supra* at 5. Even when the newly discovered evidence is not specifically requested, a new trial will be granted if the evidence, viewed in the context of the entire record, creates a reasonable doubt as to guilt. *Id.* at 112-13.

It is obvious, therefore, that the precise standard for litigating Defendant's new trial motion *cannot* be determined until the nature and scope of prosecutorial suppression is explored at an evidentiary hearing. For the courts below to dismiss Defendant's motion in the absence of such a hearing is a blatant distortion of the clear meaning of *Brady* and *Agurs*.

The courts below applied the more severe "reasonable doubt" test because they believed that Defendant had not made a specific *Brady* request.* This conclusion is untenable in light of the entire record, recognized judicial precedents, and sound policy considerations. First, the lower courts did not consider the possibility that the Government's conduct *before* and *during* the Gilbert trial resulted in the suppression of evidence to which Defendant was entitled. As the preceding factual analysis makes clear, the Government knew, or at least should have known, a substantial

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* Of course, Defendant argues that the newly unsuppressed evidence satisfies this test because it did create such reasonable doubts in the identical Revson/Csorhat trial. *See supra* at 6-11.

amount about Couri's criminal activities. Such information would have fallen within the ambit of Defendant's pre-trial *Brady* request** or his specific requests during the trial itself.

Second, both lower courts ignored Defendant's argument that his *persistent demands throughout the trial itself* for any substantial impeachment evidence constituted sufficiently specific notification. The primary purpose of a *Brady* request is to notify the prosecution of exactly what information a defendant seeks. In the case at hand, Defendant's cross-examination questions (*see, e.g.,* T 4473), his repeated requests during trial and the trial judge's comments concerning the centrality of Couri's credibility all illustrate that the Government received more than adequate notice of the need for the allegedly suppressed evidence. It would be folly to suggest that any reasonable person could fail to recognize the importance of such impeaching evidence.

As a result of these repeated and specific requests, the Government was obligated at all stages of its prosecution to reveal exactly what it knew of Couri's criminal activities. Only an evidentiary hearing can explore the extent to which the Government satisfied its constitutional obligations. In fact, if Defendant can prove what he credibly alleges – that the Government's decision to suppress evidence was deliberate – then it follows that the prosecution was sufficiently notified of what Defendant was seeking.

In the final analysis, an evidentiary hearing would certainly produce information having a direct and substantial bearing on the legal issues implicated by

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** Defendant's pre-trial *Brady* request included this quite specific provision:

> 7. Any . . . information demonstrating the commission [by Government witnesses of] any so-called "bad acts" or other instances of immoral or criminal conduct, or conduct indicating a lack of veracity.

Defendant's new trial motion. An examination of the Government's conduct before, during and after the trial will be essential to any determination of the proper standards governing Defendant's Rule 33 motion. Defendant's motion cannot be dismissed without such a hearing, and the courts below erred in not granting one.

C. In the Absence of an Unambiguous Paper Record, the Presumption Must Be in Favor of an Evidentiary Hearing.

The implications of the lower court's holdings endanger a fundamental tenet of our judicial process: The criminal justice system cannot deny its most basic safeguards to those whom the prosecution – or even the court – deems guilty. As the Second Circuit itself has recognized,

> [W]e cannot refuse a hearing because hearings generally show that there is no real basis for relief, or even because it is improbable that a prisoner can prove his claims . . . Once we embark upon shortcuts by creating a category of the "obviously guilty" whose rights are denied, we run the risk that the circle of the unprotected will grow.

United States v. Tribote, 297 F.2d 598, 603-04 (2d Cir. 1961). Indeed, in nearly every case cited by the courts below, an evidentiary hearing was held to explore allegations of misconduct. In those few cases where hearings were not held, either the judges had before them uncontradicted and sworn affidavits upon which to base their decisions, *see, e.g., United States v. Scudiero*, 446 F.Supp. 703 (S.D.N.Y. 1978), or the Government's suppression of evidence was acknowledged. *See, e.g., United States v. Provenzano*, 615 F.2d 37, 47 (2d Cir. 1980).

The practical implications of the lower courts' holding will surely ripple disturbingly throughout

our system of justice. Read literally, the lower courts' opinions would deny evidentiary hearings to defendants in almost every conceivable case. Assume for the moment that former United States Attorney Putzel wanted to inform the Government of Couri's identity but that the Government threatened to treat Putzel's clients harshly if he identified Couri by name. Even in the face of such egregious Government misconduct, the courts below would apparently not grant an evidentiary hearing. Surely such a refusal represents a fundamental misinterpretation of both *Brady* and *Agurs*. Moreover, the lower courts' findings were not made in a case where the suppressed evidence is clearly irrelevant. On the contrary, the trial court has held that the evidence involved in the case at hand is clearly *material*. Thus, to uphold the lower courts in a case such as this can only help to establish an arbitrary class of defendants who are presumed guilty and thus denied the system's most basic protection.

II.

The Trial Court Improperly Admitted Into Evidence a Consent Decree Signed by Defendant.

The trial court admitted, over Defendant's objection, (T 2045) a civil consent decree signed by Defendant in a wholly unrelated case. The trial judge instructed that the decree could only be used to evaluate Defendant's "intent, motive, the state of his knowledge and whether he was engaged in a common scheme or plan" (T 3221).

Because consent decrees are equivalent to pleas of nolo contendere, they are inadmissible under Federal Rules of Evidence 410. *See, e.g., Lipsky v. Commonwealth United Corporation*, 551 F.2d 887 (2d Cir. 1976). Thus, the courts below argued that the decree was admissible under Federal Rule of Evidence 404(b), which provides that evidence of other wrongful acts may be admissible to prove "motive, oportunity, intent, preparation, plan, knowledge, identity, or absence of mistake

or accidents." What the lower courts failed to recognize, however, is that mere consent to entry of a decree does not constitute the sort of act required under 404(b). The Fifth Circuit Court of Appeals, when confronted with a situation almost identical to the case at hand, ruled that a consent decree was inadmissible:

> [T]he present injunction documents, specifically neither admitting nor denying any act of any kind, evidence solely the fact that [the defendant] consented to entry of the injunctions. The consent to entry of injunctions of the type herein *does not constitute a crime, a wrong* or an act within the context of Rule 404(b).

United States v. Cook, 557 F.2d 1149, 1152 (5th Cir. 1977), *cert. denied*, 442 U.S. 1020 (1979) [emphasis supplied].

The case at hand is exactly analogous to *Cook*. Defendant's consent decree admits no wrongdoing whatsoever; his signature only evidences his consent to the entry of an order. As a result, the decree is not admissible under 404(b).

Because of the trial court's error, Defendant is entitled to a new trial on all counts. The jury was instructed to consider the consent decree with regard to all aspects of the prosecution:

> [The consent decree] may be received and considered only to the extent that it may bear upon Mr. Gilbert's knowledge, intent or motive *to act in respect of the matters with which you are concerned in indictment.*

(T 54-55) [emphasis supplied]. As a result of this substantial and impermissible taint, Defendant is entitled to a new trial on all counts.

III.

The Trial Court Erred in Admitting Defendant's 17-Year-Old Conviction for Impeachment Purposes.

Defendant did not testify at his trial because the court ruled a 17-year-old mail fraud conviction to be admissible for impeachment purposes (T 4774). Given the age of the conviction and its highly unusual underlying facts, the trial court's decision constitutes an abuse of discretion.

Federal Rule of Evidence 609 places, in the absence of unusual circumstances, a ten-year age limit on the admissibility of prior convictions. Defendant's conviction was over 17 years old. Moreover, the facts surrounding the conviction are highly unusual. Although Defendant pleaded guilty to a mail fraud charge, the Second Circuit Court of Appeals eventually found that Defendant's actions could not reasonably be characerized as criminal:

> [W]hen Gilbert withdrew the corporate funds, he recognized his obligation to repay and intended to do so . . . That Gilbert at no time intended to retain the corporation's funds is clear from his actions. He immediately informed several of the officers and directors, and he made a complete accounting to all of them within two weeks. He also disclosed his actions to the corporation's outside counsel, a reputable law firm, and followed its instructions regarding repayment . . . If Gilbert had been intending to abscond with the $1,953,000 it is difficult to see how he could have hoped to avoid detection in the long run. Since his equity in the corporation itself was worth well over $1,953,000, it would have been absurd for him to attempt such a theft.

Gilbert v. C.I.R., 522 F.2d 478, 481 n.9 (2d Cir. 1977).

Despite this explicit holding, the trial court admitted Defendant's aged prior conviction. The trial court

ignored the fact that Rule 609(b) intends "that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances." S.Rep.No. 93-1277, 93rd Cong., 2d Sess., *reprinted in* [1974] *U.S. Code Cong. & Admin. News* 7015. In addition, the trial court did not consider that the prior conviction involved "a program of acquisition of stock" (T 4472) and thus might appear quite similar to the allegations before the jury. The danger of impermissible prejudice was thus quite high.

In short, a 17-year-old conviction, very dubious in its authority as a comment upon Defendant's honesty, is simply insufficiently probative to overcome 609(b)'s presumption against admission. This is especially so when its admission prevented Defendant from testifying on his own behalf in a case characterized by the trial court as a choice between either Defendant or witness Couri (T 4473). Consequently, in admitting this ancient conviction, the trial court effectively thwarted Defendant's opportunity for a fair hearing on the charges against him. Accordingly, a new trial is required so that a complete defense case may be presented.

Conclusion

For the aforementioned reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix

Appendix A
Opinion of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 398—August Term, 1981
(Argued: November 20, 1981 Decided: December 11, 1981)
Docket No. 81-1323

UNITED STATES OF AMERICA,

Appellee,

—against—

EDWARD M. GILBERT,

Defendant-Appellant.

Before:

LUMBARD and NEWMAN, *Circuit Judges,*
and ZAMPANO,* *District Judge.*

Appeal from a judgment of the District Court for the Southern District of New York (Charles S. Haight, Judge), convicting the defendant of violations of the securities laws and conspiracy in violation of 15 U.S.C. §§ 78i(a)(1)(A), (B), and (C), 78i(a)(2), 78j(b), 78m(d), and 78ff, Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, and 18 U.S.C. § 371.

Judgment affirmed.

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* The Honorable Robert C. Zampano of the United States District Court for the District of Connecticut, sitting by designation.

Appendix A
Opinion of United States Court of Appeals

GERALD L. SHARGEL, New York, N.Y., and ALAN M. DERSHOWITZ, Cambridge, Mass. (Judd Burstein, New York, N.Y., Mark Fabiani, Jeffrey Leeds, Donna Levin, and Alex Makowski, Cambridge, Mass. on the brief), *for Appellant.*

JEFFREY E. LIVINGSTON, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., Peter J. Romatowski, Asst. U.S. Atty., and Robert S. Litt, Asst. U.S. Atty., New York, N.Y., on the brief), *for Appellee.*

NEWMAN, *Circuit Judge*

This is an appeal from a judgment of conviction entered on July 31, 1981 in the Southern District of New York (Charles S. Haight, Jr., Judge), following a jury verdict finding defendant Edward M. Gilbert guilty of conspiracy to manipulate securities trading in violation of 18 U.S.C. § 371 and of 33 substantive violations of the securities laws in violation of 15 U.S.C. §§ 78i(a)(1)(A), (B), and (C), 78i(a)(2), 78j(b), and 78m(d), and 78ff, and Rule 10b-5 of the Securities and Exchange Commission. Gilbert argues primarily that the District Court should have granted his motion for a new trial pursuant to Fed. R. Crim. P. 33 on the ground of newly discovered evidence, or that the District Court should at least have granted him an evidentiary hearing on the question whether the Government improperly suppressed the new evidence during trial. We find appellant's arguments without merit and affirm the judgment of conviction.

The evidence, which included testimony of 21 witnesses and hundreds of documents, revealed a scheme engineered by Gilbert to manipulate the market price of shares of Conrac Corporation, a small electronics company. During the life of the scheme in 1975, Conrac shares tripled in price on the New York Stock Exchange. Gilbert manipulated the price increase through an elaborate series of wash sales and matched orders. Gilbert and his co-conspirators traded Conrac shares through more than 90 accounts at 19 different brokerage firms; more than 40 of the accounts were directly controlled by Gilbert. Trading volume increased from 2,000 shares a day to 40,000 shares per day, with Gilbert and his co-conspirators often accounting for more than 50% of the trading. The scheme produced profits of $750,000 for Gilbert and the accounts he controlled.

The basis for appellant's new trial motion originated on February 20, 1981 while summations were being made at his trial. An attorney, Henry Putzel, III, called Thomas J. Fitzpatrick, Chief of the Criminal Division of the United States Attorney's Office, and asked if he and another lawyer, Henry H. Korn, could meet with Fitzpatrick to discuss matters affecting their clients. On February 23 Putzel and Korn told Fitzpatrick that their clients, whom they did not identify, had information that a witness who had testified for the Government had engaged in possible defalcations in his business. The lawyers did not identify their clients, the witness, the witness's business, or the trial at which the witness had testified. According to an affidavit submitted by one of Gilbert's appellate counsel, Alan M. Dershowitz, who spoke with Putzel after Gilbert's trial, Putzel and Korn decided that it would be in their clients' interest not to disclose the name of the witness until the end of the trial at which he had testified. They therefore told Fitzpatrick they preferred to wait a few days before

detailing their information. Dershowitz makes no claim in his affidavit that the lawyers told Fitzpatrick on February 23 why they preferred not to supply any details at that time. On February 25, after the jury returned its verdict in Gilbert's trial, Korn called Fitzpatrick and identified the witness as James Couri, who had testified for the Government against Gilbert. The information concerned Couri's business, Plazagal International Corporation, an auction art gallery. As subsequently detailed in a letter that the Government furnished to Gilbert's co-defendants in advance of their trial, which had been severed from Gilbert's, Couri had falsified Plazagal's records, issued bad checks, and submitted false financial data to Plazagal's bank.

Gilbert contends that Judge Haight improperly denied his motion for a new trial after the information impeaching Couri became known. This Circuit's standard for granting Rule 33 motions is clear. Most pertinently, the new evidence must be such that it would probably lead to an acquittal. *United States v. Alessi*, 638 F.2d 466, 479 (2d Cir. 1980); *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976). The motion is not favored, *ibid.*, and the strict standard for its approval does not, as appellant suggests, vary with its timing. Gilbert's motion clearly does not meet that standard. Couri's credibility had already been attacked at trial. Cross-examination had probed his plea agreement with the Government by which he had been permitted to plead guilty to one count of the charges relating to the Conrac manipulations. He was also shown to have submitted a false affidavit to a state court in unrelated civil litigation. The new evidence of his misdeeds concerning Plazagal was merely "*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable,"

United States v. Rosner, 516 F.2d 269, 173-74 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976)(emphasis in original); it could hardly have transformed the jury's image of Couri from paragon to knave. Moreover, contrary to appellant's assertion, his co-defendants' subsequent acquittal in a separate trial at which the new evidence was used to impeach Couri does not demonstrate the evidence's probable power to acquit Gilbert. In their separate trial, Gilbert's co-defendants cast themselves as pawns or dupes of Gilbert's scheme, and virtually the only evidence to contradict that characterization and implicate them in Gilbert's plan was Couri's testimony. By contrast, in Gilbert's trial there was ample independent evidence of his guilt, in the form of documents and other witnesses' testimony that either implicated Gilbert directly or corroborated Couri's testimony. As Judge Haight observed, "[T]he Gilbert jury could without difficulty have disbelieved Couri and nonetheless convicted Gilbert on the basis of evidence from other sources." Appellant's description of the two trials as a virtually perfect natural experiment in which the only variable was the new impeachment evidence seriously distorts the record. Indeed, Judge Haight granted the co-defendants a severance to avoid prejudicing them by the extensive evidence against Gilbert. *United Stats v. Gilbert*, 504 F.Supp. 565 (S.D. N.Y. 1980).

Gilbert also alleges that the Government may have been told, should have known, or could have found out about the impeachment evidence before the end of his trial, and that Judge Haight should have conducted a hearing to look into such possibilities. Gilbert's claim of Government misconduct, however, is unsupported speculation. The allegations before the District Court were simply that prior to the end of Gilbert's trial, the Government had learned that an

unidentified Government witness who had testified at an unidentified trial was subject to impeachment on unidentified grounds. After communicating with the lawyer who supplied this "information" to the Government, Gilbert's appellate counsel alleged no facts to put in issue the Government's contention that it did not learn until the end of Gilbert's trial that the witness was Couri. The mere allegation of Government misconduct was wholly insufficient to require the District Court to hold an evidentiary hearing. Moreover, even though Gilbert presented the District Court with no facts to support the claim of Government suppression of favorable evidence, Judge Haight tested the Rule 33 motion by assumings"the worst" with respect to suppression of Couri's Plazagal activities. Correctly applying *United States v. Agurs*, 427 U.S. 97 (1976), Judge Haight ruled that failure to disclose the evidence, even if known, would be constitutionally significant only "if the omitted evidence creates a reasonable doubt that did not otherwise exist," *id.* at 112, since Gilbert had made only a general demand for exculpatory evidence. *United States v. Menghi*, 641 F.2d 72, 74-75 (2d Cir.), *cert. denied*, 101 S.Ct. 2058 (1981); *Ostrer v. United States*, 577 F.2d 782, 786-87 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979). Because the evidence was only an additional part of a cumulative attack on a witness's credibility, the motion for a new trial was properly denied.

We find equally meritless Gilbert's contentions that Judge Haight improperly admitted into evidence an earlier SEC civil consent decree signed by Gilbert. The decree was clearly admissible under Fed. R. Evid. 404(b) to show that Gilbert knew of the SEC reporting requirements involved in the decree; the decree's prejudicial potential was not great, and Judge Haight properly cautioned the jury as to the limited inferences

they could permissibly draw from it. Though we have previously recognized that a consent decree and a nolo contendere plea are somewhat analogous in that neither may be used to prove underlying facts of liability, *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887 (2d Cir. 1976), a nolo plea encounters the bar of Fed. R. Evid. 410, while a civil consent decree, as the settlement of a civil suit, is governed by Fed. R. Evid. 408. The latter rule bars evidence of a compromise to prove liability for the claim, but specifically permits use of such evidence for other purposes.[1]

Finally, Gilbert contends that Judge Haight improperly applied the standards of Fed. R. Evid. 609(b) in ruling that Gilbert's prior conviction for mail fraud would be admissible to impeach his credibility if he testified. Although more than 10 years had elapsed since Gilbert had been released from his jail term resulting from the prior conviction, it was admissible under Fed. R. Evid. 609(b) upon a determination by the trial judge that its probative value substantially outweighed its prejudicial effect. Judge Haight found that should Gilbert choose to testify, his credibility would be a crucial issue, that the impeachment value of a fraud conviction was high, that the two crimes were not so similar as to invite improper inferences, and that the age of the prior conviction and the defendant's subsequent history did not suggest that he had abandoned his earlier ways. Judge Haight considered the proper factors and his finding, supported by specific facts and circumstances, was well within his discretion.

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[1] We need not consider whether Fed. R. Evid. 410, which bars evidence of a plea of nolo contendere, would require exclusion of the charges faced by an accused when he pled nolo contendere, offered to prove knowledge of legal obligations.

See United States v. Sims, 588 F.2d 1145, 1149 (6th Cir. 1978); *United States v. Mahler*, 579 F.2d 730, 734, 736 (2d Cir.), *cert. denied*, 439 U.S. 991 (1978).

The judgment of conviction is affirmed.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 29th day of January, one thousand nine hundred and eighty-two.

No. 81-1323

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-v-

EDWARD M. GILBERT,
Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by counsel for the defendant-appellant, Edward M. Gilbert,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for hearing is DENIED.

Appendix B
Order of United States Court of Appeals on Petition for Rehearing and Suggestion for Rehearing In Banc

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

01 /s/ _____

A. Daniel Fusaro
Clerk
By Francis X. Gindhart
Chief Deputy Clerk

Appendix

Office - Supreme Court, U.S.
FILED
APR 8 1982
ALEXANDER L. STEVAS,
CLERK

No.: 81-1789

IN THE

Supreme Court of the United States

October Term, 1981

EDWARD M. GILBERT,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Appendix C
Memorandum Opinion and Order of United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

S80 Cr. 493-CSH

UNITED STATES OF AMERICA

-against-

EDWARD M. GILBERT,

Defendant.

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Appendix C
Memorandum Opinion and Order of
United States District Court

HAIGHT, District Judge:

On February 25, 1981, following a seven-week trial, a jury convicted defendant Edward M. Gilbert on each of the 34 counts of a 36-count superseding indictment which charged him and co-defendants John C. Revson and Ludwig J. Cserhat with substantive violations of the securities laws, together with conspiracy to commit such violations.[1] Gilbert was tried alone, this Court having granted the motions of Revson and Cserhat to be severed from him. On May 22, 1981, following a nine-week trial before a different jury, Revson and Cserhat were acquitted on all counts of the superseding indictment in which they were named.

Prior to his trial, Gilbert made a number of motions which the Court denied. He made additional motions during trial addressed to points of evidence, and for dismissal of the charges at the end of the Government's case and at the conclusion of the trial. Finally, following the verdict Gilbert has moved for a new trial upon the ground of newly discovered evidence, pursuant to Rule 33, F.R.Cr.P.

---

[1] The indictment alleged a scheme to manipulate the stock of Conrac corporation, a company listed on the New York Stock Exchange. All defendants were charged with conspiracy in count 1, 18 U.S.C. § 371. Gilbert was charged alone with wash sales in counts 2 through 8, in violation of § 9(a)(1)(A) of the Securities Exchange Act of 1934, 15 U.S.C. § 78i(a)(1)(A). Counts 9 through 32 alleged matched orders in violation of § 9(a)(1)(B) and (C), 15 U.S.C. § 78i (a)(1)(B) and (C). Gilbert was named alone in 14 of these counts; with Cserhat in 4; and with Revson in 4. Cserhat was named alone in one of these counts, and Revson in one. Count 33 charged all defendants with violation of § 9(a)(2), 15 U.S.C. § 78i(a)(2), and count 34 charged them with violating § 10(b), 15 U.S.C. § 78j(b), and Rule 10b-5. Count 35 charged Revson and Gilbert with violating the registration requirements of § 13(d), 15 U.S.C. § 78m(d), and Rule 13d-1 in respect of Revson's holdings in Conrac. Count 36 charged Gilbert with comparable violations in respect of his holdings.

Appendix C
Memorandum Opinion and Order of
United States District Court

Gilbert's motions asserted during the course of trial were denied for the reasons stated on the record, and not reiterated here. This opinion discusses, to the extent required, his pre-trial and post-trial motions.

I.

Pre-Trial Motions

The Court ruled orally on Gilbert's pre-trial motions prior to the commencement of trial. What follows is the Court's reasoning, to the extent that a statement is necessary.

Single versus Multiple Conspiracies

Gilbert contends that count 1, the conspiracy count, is insufficient as a matter of law and duplicitous because it charges several conspiracies, involving different acts and different actors. Reliance is placed upon *Kotteakos v. United States*, 328 U.S. 750 (1946), and *Blumenthal v. United States*, 332 U.S. 539 (1947).

There is no substance to this contention. The indictment alleged, and the proof established, that Gilbert structured a conspiracy for the single, overall purpose of manipulating Conrac stock. That was the common goal of all activities alleged in the indictment; that such activities constituted violations of more than one provision of the securities laws, or allegedly involved different actors at different times, does not transform a single conspiracy into multiple conspiracies. *Frohwerk v. United States*, 249 U.S. 204, 209 (1919); *United States v. Kelly*, 349 F.2d 720, 755 (2d Cir. 1965), *cert. denied*, 384 U.S. 947 (1966); *Blumenthal v. United States, supra*, at 553-59; *United States v. Tramunti*, 513 F.2d 1087, 1106-07 (2d Cir. 1975) and cases cited, *cert. denied*, 423 U.S. 832 (1975); *James v. United States*,

416 F.2d 467, 473-74 (5th Cir. 1969), *cert. denied*, 397 U.S. 907 (1970); *United States v. Ashley*, 555 F.2d 462, 467-69 (5th Cir. 1977), *rehearing denied*, 559 F.2d 29, *cert. denied sub. nom. Leveritte v. United States*, 434 U.S. 869 (1977); *United States v. Clemones*, 577 F.2d 1247, 1253 (5th Cir. 1978); *modified*, 582 F.2d 1373, *appeal after remand*, 599 F.2d 81, *rehearing denied*, 607 F.2d 1006, *cert. denied*, 445 U.S. 927 (1980). For a case squarely applying these principles to a prosecution under § 9(a) of the 1934 Act, see *United States v. Projansky*, 465 F.2d 123, 135 (2d Cir.), *cert. denied*, 409 U.S. 1006 (1972).

Multiplicity

Gilbert contends that the indictment is multiplicitous because counts 33 and 34 arise out of the transactions covered by counts 2 through 32. Count 33 alleges the § 9(a)(2) violations; count 34 alleges the § 10(b), Rule 10b-5 violation.

It is of course the fact that the wash sales alleged in counts 2 through 8 and the matched orders alleged in counts 9 through 32 form a part of the factual underpinnings for the additional violations charged in counts 33 and 34. That point was clarified in the superseding indictment, which added to count 33 the recitation that:

> "2. The allegations contained in counts one through thirty-two of this indictment are repeated and realleged as though fully set forth herein as constituting and describing some of the means by which the defendants EDWARD M. GILBERT, JOHN C. REVSON, AND LUDWIG C. CSERHAT committed the offense charged in paragraph one hereof."

A comparable paragraph was added to count 34 in the superseding indictment.

Appendix C
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United States District Court

It hardly follows, however, that these counts are multiplicitous. Multiplicity has been defined as "the charging of a single offense in more than one count." *United States v. Israelski*, 597 F.2d 22, 24 (2d Cir. 1979). "The basic injury is whether each offense charged requires proof of a fact which the other does not." *United States v. Reed*, 639 F.2d 896, 903 (2d Cir. 1981), *citing Blockburger v. United States*, 284 U.S. 299, 304 (1932). Assuming different proof requirements, the indictment is not rendered multiplicitous because of a "substantial overlap" in the offered proof. *United States v. Smith*, 574 F.2d 308, 310 (5th Cir.), *cert. denied*, 439 U.S. 931 (1978).

In the case at bar, the § 9(a)(1), § 9(a)(2), and § 10(b) counts contained different elements and each could have stood alone. In consequence, they are not multiplicitous.

Section 9 of the 1934 Act, 15 U.S.C. § 78i, captioned "Manipulation of security prices," curtails that activity in several ways. Section 9(a)(1), set out in the margin,[2]

---

[2] "(a) It shall be unlawful for any person, directly or indirectly, by the use of the mails or any means or instrumentality of interstate commerce, or of any facility of any national securities exchange, or for any member of a national securities exchange –

"(1) For the purpose of creating a false or misleading appearance of active trading in any security registered on a national securities exchange, or a false or misleading appearance with respect to the market for any such security, (A) to effect any transaction in such security which involves no change in the beneficial ownership thereof, or (B) to enter an order or orders for the purchase of such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the sale of any such security, has been or will be entered by or for the same or different parties, or (C) to enter any order or orders for the sale of any such security with the knowledge that an order or orders of substantially the same size, at substantially the same time, and at substantially the same price, for the purchase of such security has been or will be entered by or for the same or different parties.

proscribes a variety of transactions, each designed "for the purpose of creating a false or misleading appearance of active trading" in a security, "or a false or misleading appearance with respect to the market" for a security. Subsections (a)(1)(A), (B) and (C) specify the illegal transactions falling within that general prohibition. Subsection (a)(1) focuses upon *single* transactions, notwithstanding the references in (a)(1)(B) and (C) to "order or orders." Both (a)(1)(B) and (C) are intended to reach "matched orders," for purchase or sale of securities respectively; the statute's logical intent was to prevent evasion of its purpose by splitting the matching orders into component parts.

By way of contrast, subsection (a)(2) deals with a course of conduct extending over more than one transaction. Subsection (a)(2), following the designation of unlawful means, provides that it shall be unlawful:

> "To effect, alone or with one or more other persons a series of transactions in any security registered on a national securities exchange creating actual or apparent active trading in such security or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others."

Thus subsections (a)(1) and (2) create separate and distinct offenses. The distinction lies in the number of transactions necessary to sustain a conviction under (a)(2). A single transaction is sufficient to convict under (a)(1)(A), (B) or (C), assuming the requisite criminal purpose, knowledge and intent are shown. But the Government must prove a "series of transactions" having those illicit characteristics to sustain its charge under (a)(2). With respect to the wash sale and matched order counts, the Government stands or falls upon its proof on each separate transaction. The Government could theoretically prove only a single wash sale or matched order under section (a)(1), and

accordingly fail in its proof under (a)(2), which requires proof of a "series of transactions." In point of fact, at trial the Government proved to the jury's satisfaction that Gilbert was guilty of a number of wash sales and matched orders; but that does not change the analysis of the cited cases, which focuses upon whether the (a)(2) count requires proof of a fact--i.e., a "series of transactions"--which the other separate counts do not. Because that question must be answered in the affirmative, the counts are not multiplicitous.

Similarly, the Government must prove additional elements to obtain a conviction under the anti-fraud statute, § 10(b) and Rule 10b-5; they are familiar and need not be reiterated here. It is sufficient to say that they constitute elements additional to those which the Government must establish to convict a defendant of perpetrating wash sales or matched orders.

Duplicity

Gilbert attacks various counts as duplicitous. Duplicity in an indictment is defined as "the charging of "two or more separate and distinct offenses in one count," *United States v. Lennon*, 246 F.2d 24, 27 n.4 (2d Cir. 1957); it is not "the charging of a single offense into which several related acts enter as ways and means of accomplishing the purpose." *Id.* The present indictment does not suffer from duplicity. While the allegation of several offenses in the same count is improper, the allegation in a single count of the commission of a crime by several means is not. *United States v. Murray*, 618 F.2d 892, 896 (3d Cir. 1980). That is sufficient to preserve present counts 33 and 34. Although Gilbert also attacks the conspiracy count as duplicitous, it is well settled that "[t]he allegation in a single count

of a conspiracy to commit several crimes is not duplicitous, for '[t]he conspiracy is the crime and that is one, however diverse its objects.' " *United States v. Murray, supra,* at 896, *quoting Braverman v. United States,* 317 U.S. 49, 54 (1942).

Gilbert also attacks a number of the matched sale counts as charging more than one crime in a single count. Main brief at 39-41. The counts Gilbert selects for this challenge are those in which more than one sell order or buy order are alleged. Attacking these counts as duplicitous can only result from a misapprehension of the nature of § 9(a)(1)(B) and (C), which for the reasons noted *supra,* prohibit the placing of "an order or orders" for the proscribed purposes. All these counts allege is that, in order to complete the overall, proscribed matched order, the defendant entered more than one order on the buy or sell side of the transaction. This is not duplicitous.

James Hearing

Relying on *United States v. James,* 590 F.2d 575 (5th Cir. 1979) (*en banc*) ("*James II*"), Gilbert requested a hearing in advance of trial to determine the admissibility of any hearsay evidence which the Government proposed to elicit through the testimony of alleged co-conspirators. That hearing was denied. Gilbert misreads *James II,* and ignores contrary authority in this Circuit.

In *James II,* the Fifth Circuit adopted a "preferred order of proof" with respect to government offers of extra-judicial declarations against defendants on trial:

> "The district court should, *whenever reasonably practicable,* require the showing of a conspiracy

> and of the connection of the defendant with it before admitting declarations of a co-conspirator. *If it determines it is not reasonably practical to require the showing to be made before admitting the evidence, the court may admit the statement subject to being connected-up.*" 590 F.2d at 582 (emphasis added).

As is made clear in Judge Tjoflat's special concurrence, the Fifth Circuit declined to adopt the original panel's decision to require the same "minitrial procedure" urged by Gilbert in advance of his trial. *James II, supra*, 590 F.2d at 585 ("This case was taken *en banc* because the minitrial procedure fashioned by the panel is obviously unworkable and onerous.").

Thus, the prevailing practice in the Fifth Circuit is consistent with the rule consistently followed by the courts of this Circuit, first announced in *United States v. Geaney*, 418 F.2d 1116 (2d Cir. 1969), *cert. denied sub. nom. Lynch v. United States*, 397 U.S. 1028 (1970) and more recently restated in *United States v. DiPalermo*, 606 F.2d 17, 21 (2d Cir. 1979); *quoting United States v. Lyles*, 593 F.2d 182, 194 (2d Cir.), *cert. denied*, 440 U.S. 472 (1979) ("[T]he judge may permit such declarations to be admitted 'subject to connection' on a representation by the Government that sufficient connection will be produced..."). Significantly, the Second Circuit cited *Geaney* and *Lyles* without comment in its most recent statement of the rule at issue in *United States v. Lieberman*, 637 F.2d 95, 102 (2d Cir. 1980).

The order of proof on the trial proceeded in accordance with the principles succinctly stated by Judge Friendly in *Geaney, supra*:

> "While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection,' the judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. If it has not, the judge must instruct the jury to disregard the hearsay or, when this was so large a proportion of the proof as to render a cautionary instruction of doubtful utility, as could well have been the case here, declare a mistrial if the defendant asks for it." 417 F.2d at 1120 (footnote omitted).

The trial was conducted in the manner dictated by *Geaney* and its progeny, the Court making the requisite "Geaney" finding at the appropriate time.

Statute of Limitations and Speedy Trial Claim

Gilbert attacks the indictment as untimely under pertinent statutes of limitation. Alternatively, he alleges denial of his right to a speedy trial guaranteed by the Sixth Amendment, and also relies upon Rule 48(b), F.R.Cr.P.

As to the statute of limitations, Gilbert argues without citation of authority that § 9(e) of the 1934 Act, 15 U.S.C. § 78i(e), imposes a 3-year limitations period upon this criminal indictment. It does not. Section 78i(e) applies only to civil actions. Criminal violations

of § 78i are governed by the general 5-year criminal statute, 18 U.S.C. § 3282. *United States v. Stein*, 456 F.2d 844, 850 (2d Cir.), *cert. denied*, 408 U.S. 922 (1972); *United States v. Quinn*, 445 F.2d 940, 942-43 (2d Cir. 1970), *cert. denied*, 404 U.S. 850 (1971); *United States v. Bloom*, 78 F.R.D. 591, 598 (E.D.Pa. 1977).

Assuming applicability of the 5-year statute, Gilbert challenges count 1, the conspiracy count, and substantive counts 33, 34, 35 and 36. These contentions are equally unavailing.

The indictment was filed on August 19, 1980. Thus criminal acts occurring on or after August 19, 1975 are not time-barred. Although count 1 alleges that the conspiracy *began* on January 1, 1975, it is also alleged to have continued to January 15, 1976. The indictment charges overt acts in furtherance of the conspiracy occurring subsequent to August 19, 1975. Accordingly the conspiracy count was not barred on its face by the statute of limitations, which does not begin to run until commission of the last overt act in furtherance of the conspiracy. *Fiswick v. United States*, 329 U.S. 211, 216 (1946); *United States v. Cianchetti*, 315 F.2d 584, 589 (2d Cir. 1963); *United States v. Villa*, 470 F.Supp. 315, 320 (S.D.N.Y. 1979). There was ample evidence introduced at trial from which the jury could find that an overt act was committed subsequent to August 19, 1975.

Substantive counts 33 and 34, while standing upon a somewhat different posture, are also not barred by the statute of limitations. The general 5-year criminal statute applies to violations of § 9(a)(2) and § 10(b), *United States v. Bloom, supra*. As noted, the statute was tolled on August 19, 1980 by the filing of the indictment, a tolling not affected by the subsequent bringing

of a superseding indictment addressing these counts, which (as here) does not broaden the charges of the original indictment. *United States v. Grady*, 544 F.2d 548, 601-02 (2d Cir. 1976).

Count 33 of the superseding indictment charges defendants with effectuating "a series of transactions in Conrac stock" so as to create actual or apparent trading, or raising the price, so as to induce purchase by others, in violation of § 9(a)(2). The superseding indictment repeats and realleges the transactions referred to in counts 2-32 as some of the means of effecting the scheme. Count 34, again referring to those several transactions, charges defendants with fraudulent practices in violation of § 10(b). Counts 33 and 34 each allege that the acts charged occurred from January 1, 1975 to December 18, 1975 (when trading in Conrac stock was suspended). Defendant argues that since these counts deal with periods of time beginning with January 1, 1975, they are barred by the 5-year statute.

The argument must fail if the offense charged be viewed as a continuing one, with some of the illegal actions falling within the limitations period. *Toussie v. United States*, 397 U.S. 112, 114 (1970). In the case at bar, all transactions alleged in counts 2-32 as means of the scheme occurred after August 19, 1975, and may therefore be considered. I am mindful of the Supreme Court's caution in *Toussie* that "the doctrine of continuing offenses should be applied only in limited circumstances," 397 U.S. at 115; but the Court went on to say:

> "These considerations do not mean that a particular offense should never be construed as a continuing one. They do, however, require that such a result should not be reached unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must

assuredly have intended that it be treated as a continuing one." *Id.*

Section 9(a)(2) of the 1934 Act, the statute underlying count 33, prohibits the effectuation of "a series of transactions" in securities for the purpose of inducing purchase or sale. I hold that, in the words of *Toussie*, this statute compels, in its explicit language, the conclusion that the offense be regarded as a continuing one. At the very least, "the nature of the crime is such that Congress must assuredly have intended that it be treated as a continuing one." A "series of [illicit] transactions" is synonymous with a "continuing offense." *United States v. Bloom, supra*, reached that conclusion in sustaining a § 9(a)(2) indictment against statute of limitations challenge. 78 F.R.D. at 598. I agree with the analysis in *Bloom*, and reject the limitations defense as to both counts; the same analysis applies equally to count 34.

Gilbert also attacks counts 35 and 36 as time-barred under the 5-year statute. There is no basis for doing so. The underlying statute, § 12(d) of the 1934 Act, requires *inter alia* the filing with the SEC of the beneficial ownership of a registered security. If the circumstances giving rise to the failure to register occurred more than five years before indictment, *Toussie* might very well require dismissal; that case holds that a prosecution for failure to register for the draft was time-barred when initiated more than five years after the statutory obligation to register arose. The court rejected the government's contention that failure to cure the default constituted a continuing offense. But the present indictment alleged that the acquisition in Conrac creating the obligations to report[3] occurred

[3] Count 35 charged Gilbert with aiding and abetting Revson's failure to report. Count 36 charged Gilbert with failing to report his own acquisitions.

subsequent to August 19, 1975; and the jury was entitled to so find on the facts adduced. In consequence, the charged failures to report fell within the limitations period.

For these reasons, the statute of limitations furnishes no bar to any part of the indictment.

Gilbert's speedy trial claim is based upon the passage of time between the SEC's investigation into trading of Conrac stock, which began in 1975, and the indictment in August of 1980. Although Gilbert invokes the Sixth Amendment, the constitutional guarantee of a speedy trial contained therein does not apply to pre-indictment delay. *United States v. Marion*, 404 U.S. 307 (1971); *United States v. Lovasco*, 431 U.S. 783 (1977); *United States v. Ellsbery*, 602 F.2d 1054, 1058 (2d Cir. 1979); *United States v. Lai Ming Tanu*, 589 F.2d 82, 87 (2d Cir. 1978). No claim of delay between indictment and trial is made in the case at bar; and the trial date complies with the requirements of the Speedy Trial Act, 18 U.S.C. §§ 1361 *et seq.* and this Court's speedy trial plan. Nor does Rule 48(b), whose text appears in the margin,[4] afford Gilbert a basis for relief. Its first phrase is limited to post-arrest delay, *United States v. Hauff*, 461 F.2d 1061 (7th Cir. 1972), *cert. denied*, 409 U.S. 873 (1973), and does not apply since Gilbert was not arrested. The Rule's second phrase is "coterminous" with the Sixth Amendment, *Lai Ming Tanu, supra*, at 87, and equally inapplicable to pre-indictment delay. *See also Marion, supra*, at 319.

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[4] The rule provides:

"If there is unnecessary delay in presenting the charge to a grand jury or in filing an information against a defendant who has been held to answer to the district court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, information or complaint."

Gilbert's only arguable basis is the Due Process Clause of the Fifth Amendment, which the *Marion* Court said:

> "...would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to [defendant's] rights to a fair trial and that the delay was an intentional device to gain tactical advantage over the accused." 404 U.S. at 324.

In *Lovasco, supra*, the Court cautioned "that the Due Process Clause has a limited role to play in protecting against oppressive delay," 431 U.S. at 789, and reiterated that proof of prejudice to the defendant was necessary, to be considered together with the reasons for the delay.

Gilbert's pre-trial motion failed entirely to demonstrate a basis for Fifth Amendment relief, or for a pre-trial hearing on the issue. His motion papers did not even suggest that the delay between SEC investigation and criminal indictment constituted an intentional device for tactical advantage. Delay resulting from prosecutorial "negligence or indifference," even if established (and I do not hold that it was) is legally insufficient. *Marion, supra*, at 310. If it be said that Gilbert required an evidentiary hearing to develop more fully the reason for delay, the answer lies in the second element a defendant must demonstrate, as to which he also has the burden: resulting prejudice to his defense. Gilbert's accusations on that score, as set forth in his brief, were non-specific, conclusory, and legally insufficient. *Marion, supra*, at 325-26; *United States v. Rubin*, 609 F.2d 51, 66 (2d Cir. 1979); *United States v. Ellsbery, supra*, at 1059. These deficiencies were not remedied by anything offered or suggested at trial.

For these reasons, Gilbert's motion addressed to the timeliness of the indictment and the trial is denied.

Other Pre-Trial Claims

Gilbert's claimed grand jury improprieties, cast in conclusory terms, are rejected for the reasons stated by Judge Elfvin in denying identical motions in *United States v. Olin Corp.*, 465 F.Supp. 1120, 1134-1136 (W.D.N.Y. 1979), and Second Circuit cases there cited. I am satisfied from examination of grand jury minutes furnished under 18 U.S.C. § 3500 during trial that there was sufficient evidence upon which to base the indictment. Gilbert's conclusory allegations of grand jury "leaks," in violation of Rule 6(e), F.R.Cr.P., do not survive the Government's answering affidavits. *Matter of The Special April 1977 Grand Jury*, 587 F.2d 889, 892 (2d Cir. 1978), and cases cited.

The claim of parallel investigations, based primarily upon the Supreme Court's pronouncement concerning I.R.S. investigations in *United States v. LaSalle National Bank*, 437 U.S. 298 (1978), is not viable in the present context of an S.E.C. inquiry, followed by a criminal prosecution. *S.E.C. v. Dresser Industries, Inc.*, 628 F.2d 1368 (D.C.Cir.), *cert. denied*, ____ U.S. ____, 101 S.Ct. 529 (1980); *United States v. Fields*, 592 F.2d 638 (2d Cir. 1978), *cert. denied*, 442 U.S. 917 (1979). The collateral estoppel, and selective prosecution claims, as well as the contention that the securities laws are unconstitutionally vague, are equally without merit, and require no discussion.

Having considered all of Gilbert's pre-trial motions, whether or not discussed herein, I deny them all.

Appendix C
Memorandum Opinion and Order of
United States District Court

II.

Post-Trial Motion

Gilbert's post-trial motion seeks a new trial, pursuant to Rule 33, F.R.Cr.P., on the ground of newly discovered evidence.

The rule provides in pertinent part:

> "The court on motion of a defendant may grant a new trial to him if required in the interest of justice...A motion for a new trial based on the ground of newly discovered evidence may be made only before or within two years after final judgment, but if an appeal is pending the court may grant the motion only on remand of the case. A motion for a new trial based on any other grounds shall be made within 7 days after verdict...of guilty or within such further time as the court may fix during the 7-day period."

The present motion arises from the following circumstances. The Gilbert trial began on January 12, 1981. One James C. Couri, characterized by the Government as a co-conspirator with Gilbert in the Conrac manipulation, was a prosecution witness. Couri had been permitted to plead guilty to one count relating to Conrac, executed the usual cooperation agreement, and thereafter testified before the grand jury and at trial.

Before Couri's cross-examination began, the Government made available to Gilbert's counsel the particulars of Couri's plea bargain and cooperation agreement. The Government also furnished defense counsel, pursuant to 18 U.S.C. § 3500, with copies of motion papers and affidavits filed in *Manufacturers and Traders Trust Co. v. Plazagal International Corp. and Couri*, an action commenced in New York State

Supreme Court, Erie County (Index No. E-88772). The Manufacturers and Traders Trust Co. ("M&T") sued Plazagal, an auction gallery, and Couri, who controlled it, to enforce security interests M&T had in the gallery's accounts receivable, inventory and equipment, M&T alleging an indebtedness to it under various demand notes of about $1,800,000. The affidavits alleged, *inter alia*, Couri's efforts to thwart and evade the state court's order for inspection of Plazagal's premises and books.

At trial Couri testified that he became involved with Gilbert in August, 1975, and from that time until the suspension of trading in Conrac worked closely with Gilbert, assisting in the latter's manipulation of the company's stock by the several means alleged in the indictment.

Gilbert's counsel, attacking Couri's credibility, made reference on cross-examination to the plea bargain, the M&T indebtedness, and other legal disputes Couri had with consignors of articles to his auction gallery and others. At one point counsel was able to demonstrate that Couri had lied in an affidavit to a state court in civil litigation. Defense counsel's ability to pursue these collateral matters by means of extrinsic evidence was, of course, limited by Rule 608(b), F.R.Evid. However, defense counsel, on the basis of his cross-examination, was in a position to argue to the jury in summation that Couri "is a con man, he is a hustler, hs is a liar, and he is a cheat. And he is a devious person." Tr. 5138. Counsel argued further that, Couri having demonstrably lied in an affidavit, he should be disbelieved in everything he said, just as a diner would reject an entire plate of stew if one piece of meat was tainted. Tr. 5145-46. Counsel stressed the favorable plea bargain, and Couri's consequent motive to color

his testimony, Tr. 5179-80, and concluded that if Gilbert could be convicted "on this circumstantial evidence and on the word of a James Couri..., then no one is safe." Tr. 5203.

Counsel for the Government and the defense summed up to the jury on Friday, February 20, 1981, their speeches consuming the entire day. The Court delivered its charge during the morning of Monday, February 23. The alternate jurors were dismissed and the regular jurors began their deliberations, lunch being sent into the jury room to sustain them. The jury returned its verdict on February 25, convicting Gilbert on all counts in which he was named.

Central to the present motion are discussions which were taking place, at these times, in the office of the United States Attorney for this District. The cast of characters, in the order of their appearance, are Henry Putzel and Henry H. Korn, two former Assistant United States Attorneys now in private practice; Thomas J. Fitzpatrick, chief of the criminal division of the United States Attorney's office; and Jeffrey E. Livingston and Peter J. Romatowski, Assistant United States Attorneys in charge of the Gilbert, Revson and Cserhat prosecutions. The following narrative is taken from Livingston's letter of March 18, 1981[5] to counsel for Revson and Cserhat (then awaiting trial), with copies to the Court and trial counsel for Gilbert:

> "During the mid-afternoon of February 20, 1981, Thomas J. Fitzpatrick, Chief of the Criminal Division, received a telephone call from Henry Putzel, III, Esq., in which Mr. Putzel

[5] A copy of the letter is attached as an exhibit to the affidavit of Alan M. Dershowitz, counsel for Gilbert on the motion for a new trial.

asked to meet with Mr. Fitzpatrick on the following Monday in regard to matters which could affect individuals represented by him and Henry H. Korn, Esq. Mr. Putzel did not mention any names or the nature of the matters. On Monday February 23, 1981, Mr. Putzel and Mr. Korn informed Mr. Fitzpatrick of the general nature of their information, on a no-name basis. During the course of this meeting, Mr. Fitzpatrick learned that the information concerned a cooperating witness who had previously testified as a Government witness. Mr. Fitzpatrick asked for the name of the witness. Messrs. Putzel and Korn stated that they preferred to wait a few days before disclosing the name of this individual. During the afternoon of February 25, 1981, after the verdict had been returned in *United States* v. *Gilbert*, Mr. Korn called Mr. Fitzpatrick and informed him that the subject of the information was James C. Couri. On February 26, 1981, Assistant United States Attorneys Livingston and Romatowski learned of this information for the first time, when they were informed by Mr. Fitzpatrick."

Gilbert's present counsel asked Putzel why he had told Fitzpatrick on February 23 that he preferred to wait a few days before disclosing the name of the cooperating witness. That inquiry, according to counsel's affidavit,[6] elicited the following reply:

"Putzel told me that he and Mr. Korn, who had both previously served as Assistant United States Attorneys in the Southern District, had

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[6]Dershowitz affidavit of June 4, 1981 at Para. 14, p. 6.

> analyzed what the Government's obligations would be if they were to disclose the name of the witness during the terminal phases of the Gilbert trial. They then concluded that their clients' interest might be served by not making the Government's job any more difficult. Accordingly, they informed Mr. Fitzpatrick that they preferred to wait a few days before making the disclosure."

Livingston's letter of March 18 to counsel and Court goes on to state:

> "Since February 26, 1981, the United States Attorney's Office has interviewed a number of individuals and collected certain documents. Certain information obtained in the investigation is set forth below. Despite the fact that the reliability of the information has not been determined, it is being provided now, in light of the proximity of the Revson and Cserhat trial."

The letter then summarizes the results of the Government's further investigation into Couri's affairs. It is fair to say, as the present motion contends, that the investigation revealed that Couri had engaged in extensive fraud and deceit during 1979 and 1980, as the owner of Plazagal. That fraud included alterations of the gallery's financial records to improve apparent profitability and inventory levels, in order to maintain existing credit and secure additional loans from M&T; the direction by Couri to Plazagal's employees to deceive consignors of the gallery with respect to the sales of their goods and the payment of money due to them; the destruction by Couri of an employee's daily business diary which reflected unfavorably on Couri; and the issuance by Couri of worthless checks. At the trial

of Revson and Cserhat, Couri was cross-examined vigorously on these matters, during the course of his examination admitting, *inter alia*, to the bribing of an officer of M&T.

The trial of Revson and Cserhat began on March 23. On that date, Couri's counsel advised the prosecutors that Couri would invoke his Fifth Amendment rights and refuse to testify at the trial, unless a bargain was struck limiting his criminal liability for the Plazagal transactions. On March 28, Couri agreed to plead guilty to two counts of an information charging him with making false statements to a bank, in violation of 18 U.S.C. § 1014. District Judge Lasker accepted these pleas on March 31. Couri, having as a part of his plea bargain reaffirmed his agreement to cooperate with the Government, thereupon gave evidence against Revson and Cserhat. Counsel for these defendants, in addition to the results of the Plazagal inquiries, stressed this additional plea bargain as a factor reflecting adversely upon Couri's credibility.

The trial of Revson and Cserhat consumed nine weeks of trial, during which the Government called 35 witnesses and the defendants put in no case. On May 22, 1981, following two and one-half days of deliberations, the jury acquitted both Revson and Cserhat on all counts in which they were named. Gilbert's motion for a new trial, based upon the foregoing facts, followed.

Discussion

Gilbert's motion is one for a new trial under Rule 33 on the ground of newly discovered evidence. As Judge Metzner of this Court observed in *United States v. Scudiero*, 446 Supp. 703 (S.D.N.Y. 1978):

> "The rule in the Second Circuit is clear. To warrant a new trial, it must be shown that the newly discovered evidence is of such nature that it would probably produce an acquittal."

Judge Metzner cited for this proposition *United States v. Houle*, 490 F.2d 167, 170 (2d Cir. 1973), *cert. denied*, 417 U.S. 970 (1974), and *United States v. Agurs*, 427 U.S. 97, 111 n.19, 113 (1976). In *Houle* the Second Circuit said at 170: "Newly discovered evidence justifies a new trial only if that evidence is '...of such nature, as that, on a new trial, the newly discovered evidence would probably produce an acquittal,'" quoting *Tropiano v. United States*, 323 F.Supp. 964, 966 (D.Conn. 1971), *per* Timbers, D.J. *Agurs*, at 111 n. 19, cites *Houle* with approval as one of several lower court decisions applying, in the Rule 33 context, "the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal." A more recent, detailed statement of the standards applicable to a Rule 33 motion based upon post-trial discovered evidence appears in *United States v. Alessi*, 638 F.2d 466 (2d Cir. 1980). Judge Mansfield's opinion affirming the denial of a motion for a new trial states:

> "In our view the trial judge's ruling was correct and in accordance with our repeated instructions that such a motion 'should be granted only with great caution' and only upon a showing that the evidence could not with due diligence have been discovered before or during trial, that the evidence is material, not cumulative, and that admission of the evidence would probably lead to an acquittal." 638 F.2d at 479 (citing cases).

Alessi quoted *United States v. Stofsky*, 527 F.2d 237, 243 (2d Cir. 1975), *cert. denied*, 429 U.S. 819 (1976), in which Judge Manfield cautioned that "in the interest

of according finality to a jury's verdict, a motion for a new trial based upon previously-undiscovered evidence is ordinarily 'not favored and should be granted only with great caution,'" quoting *United States v. Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *See also Mesarosh v. United States*, 352 U.S. 1, 9 (1956) (defense motion for new trial under Rule 33, based upon government witness's untruthful statements "as newly discovered evidence affecting his credibility at the trial...ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often-repeated statement of the courts, an adequate basis for the grant of a new trial").

Judged by these standards, the present motion must be denied. The post-trial disclosures with respect to Couri's Plazagal-related fraud do not constitute "direct, exculpatory evidence"; rather, they constitute "*additional* evidence tending *further* to impeach the credibility of a witness whose character had already been shown to be questionable," *United States v. Rosner*, 516 F.2d 269, 273-74 (2d Cir. 1975), *cert. denied*, 427 U.S. 911 (1976) (emphasis in original). Thus, in *Alessi's* phrase, the evidence at bar is not material but only cumulative; and, in the totality of the circumstances, I cannot possibly conclude that admission of the evidence on a new trial would probably lead to acquittal.

Gilbert argues that Couri testified at both the Gilbert and Revson/Cserhat trials; that the expanded basis for cross-examining Couri on the Plazagal matters was available to Revson and Cserhat, but not to Gilbert; that Revson and Cserhat were acquitted but Gilbert was convicted; so that it necessarily follows that Gilbert would be acquitted on a new trial if such material was available to him: Q.E.D.

The basic premise is false; and its falsity lies in the entirely different nature of the Government's proof against Gilbert on the one hand, and Revson and Cserhat on the other. Stated simply, the Gilbert jury could without difficulty have disbelieved Couri and nonetheless convicted Gilbert on the basis of evidence from other sources. But if the Revson/Cserhat jury rejected Couri's evidence as unworthy of belief, an unbridgeable chasm opened up at the center of the Government's case. Gilbert's difficulty was that, quite apart from the testimony of Couri, his own acts and the testimony of others condemned him. Gilbert was identified as a "chartist" by brokers and acquaintances other than Couri; a "chartist" is an investor who makes investment decisions on the basis of the movement of a stock's volume and price charts, data kept current by the tickertape. Acting in his own name or through nominees or individuals he could control, Gilbert had established, by the end of 1975, more than forty separate accounts at different brokerage houses which dealt in Conrac stock. Couri was involved in some of these accounts; but 28 accounts were in place, and trading in Conrac stock, before Couri first came on the scene, in August of 1975. The trading in Conrac in these accounts, reaching increasingly frenetic levels in late 1975, and questionable on their face when viewed by ordinary marketplace motivations, was clearly revealed by the documentary evidence. The skeleton of that documentary evidence, arguably sufficient in and of itself to justify an inference of manipulative intent, was fleshed out by the testimony of such witnesses as Jost Fleck, a former employee and acquaintance of Gilbert's. Gilbert, taking advantage of Fleck's financial straits, bent Fleck to his will, and used the names of Fleck's corporations to further

the criminal scheme. What emerges from Fleck's testimony is a classic portrait of Gilbert as a stock market manipulator.

The Fleck testimony is illustrative only. Other witnesses gave comparable testimony, to supplement the dramatic evidence of the documents themselves. This analysis need not be further extended. It is sufficient to say that, at the Gilbert trial, the Government was in a position to offer, quite independently of Couri's testimony, a wealth of evidence from which the jury could reasonably conclude that Gilbert was "painting the tape" in Conrac, and otherwise manipulating the market, just as the indictment charged.

The situation respecting Revson and Cserhat was markedly different. As the fortuitous result of his prior acquaintance with Couri, Revson became involved with Gilbert and the Conrac manipulation in September of 1975. However, the brokerage accounts set up in Revson's name were actually traded by Couri, pursuant to powers of attorney Revson gave Couri; Revson's defense at trial was, in essence, that he was an innocent dupe. The Government had available to it no significant evidence, direct or circumstantial, to demonstrate otherwise, apart from the testimony of Couri. Indeed, in nine weeks of trial the only direct evidence linking Revson to the machinations of the Conrac conspirators came down to this: three pages of testimony by Couri that, from time to time, he would telephone Revson and describe to Revson the methods by which Gilbert was manipulating the stock, to which advice Revson would respond with little glad cries of admiration and approval. That bit of testimony formed the linchpin of the Government's case against Revson. The jury was entitled to believe this evidence, an entitlement which permitted the Government to survive Revson's Rule 29 motion. But if it did not (and in con-

trast to the case against Gilbert), there was no substantive evidence of knowledge or intent to take its place.

As for Cserhat, he was a partner in the stock brokerage firm of Heine, Fishbein, with which Gilbert had placed many (but not all) of the accounts in which he traded Conrac. Cserhat's defense was that he did nothing but execute for a customer trading orders of apparent legitimacy; again, the key issues were knowledge and intent. And again, in contrast with the Government's case against Gilbert, there was very little evidence on these points independent of Couri. Couri tstified that, as he manned the telephone at Gilbert's offices during the height of the manipulation, he had conversations with Cserhat during which Cserhat asked questions or made statements tending to show knowledge of and participation in the scheme. Just as in the case of Revson, Couri's account of telephone conversations with Cserhat was of crucial importance to the Government's theory. Just as in the case of Revson (and again in contrast with that of Gilbert), there was a dearth of evidence of Cserhat's own acts, or evidence from other sources, which would permit the jury to infer guilty knowledge and intent if it disbelieved Couri.

The same considerations apply to Couri's testimony concerning the statements and activities of Revson and Cserhat after trading in Conrac had been suspended. Those actions and statements, if Couri's testimony was accepted, were consistent with guilty knowledge and a desire on the part of Revson and Cserhat to cover up the manipulation; but again, there were no independent sources of corroboration.

Thus the significant difference in the two trials lies not in the extent to which Couri was subject to cross-examination on the collateral subject of Plazagal, but rather the quantum discrepancy in the direct, non-Couri evidence available to the Government. During the Gilbert trial, documents and the testimony of other witnesses either implicated Gilbert directly, or served to corroborate certain aspects of Couri's testimony; those elements were simply not present to a significant degree at the trial of Revson and Cserhat.

That is not to say that trial counsel for Gilbert would not have welcomed the opportunity of cross-examining Couri on his Plazagal machinations to the extent that counsel for Revson and Cserhat were able to do. Nor can I foreclose the possibility that, armed with such additional ammunition, Gilbert's able trial lawyer might have achieved a different result. However, "[a] new trial will not be ordered on the chance that it might produce an acquittal." *United States v. Scudiero, supra*, at 704. As noted, the rule requires that newly discovered evidence be of such nature that it would probably produce an acquittal; and in the circumstances of this case, I cannot possibly reach such a conclusion.

Gilbert argues earnestly that his new trial motion cannot be denied without an evidentiary hearing to explore the "question of Government responsibility for non-production or delay" in respect of Couri and Plazagal (main brief at 42). Three areas of inquiry are suggested: whether the prosecutors learned more than they revealed about Couri's problems with Plazagal as they prepared his testimony before and during the Gilbert trial; the precise details of the Putzel-Korn-Fitzpatrick dialogue during the period February 20-25;

and the Gilbert prosecutors' delay between February 25 and March 18 in making the Couri/Plazagal information known to defense counsel.

No hearing is required into these areas because the issues are irrelevant. Gilbert disregards recent controlling authority. The Second Circuit cases he cites,[7] in which the materiality of newly discovered evidence depended in part upon the government's responsibility in concealing it, all antedate *United States v. Agurs, supra*, in which the Supreme Court held that the government's constitutional obligation to disclose exculpatory material, as declared in *Brady v. Maryland*, 373 U.S. 83 (1963), is *not* "measured by the moral culpability, or the wilfulness, of the prosecutor." The focus is, rather, upon the evidence: "If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor." 427 U.S. at 110. Subsequently the Second Circuit in *United States v. Provenzano*, 615 F.2d 37, 47 n.19 (2d Cir. 1980), declined to consider defendant's argument that the district court "erred in refusing to hold an evidentiary hearing on his motions for a new trial for the purpose of determining whether the withholding of information was negligent or deliberate." The defendant in *Provenzano* relied upon *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975), as does Gilbert (main brief at 43); but the *Provenzano* court observed: "The inquiry to which such a hearing might have been directed strikes us as not germane in the light of the Supreme Court's decision

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[7] *Kyle v. United States*, 295 F.2d 507 (2d Cir. 1961); *United States v. Keogh*, 391 F.2d 138 (2d Cir. 1968); *United States v. Roberts*, 388 F.2d 646 (2d Cir. 1968); *United States v. Morell*, 524 F.2d 550 (2d Cir. 1975). Gilbert also cites *United States v. Tribote*, 297 F.2d 598 (2d Cir. 1961); that case involved the necessity for a hearing on defendant's claim that he was denied his right to the assistance of counsel when his sentence was imposed, and is entirely inapposite.

in *United States v. Agurs*," thereupon quoting the language from 427 U.S. at 110 to which I have just referred.

Under *Agurs*, a prosecutor's failure to disclose evidence, in response to a general demand under *Brady*, is significant only "if the omitted evidence creates a reasonable doubt that did not otherwise exist," *id.* at 112.[8] Assuming *arguendo* the worst with respect to Government suppression of Couri's Plazagal activities, the evidence does not rise to that level, any more than it meets the test required for a new trial under Rule 33.

Gilbert relies upon the rule of *Giglio v. United States*, 405 U.S. 150 (1972) and its progeny, such as *United States v. Seijo*, 514 F.2d 1357 (2d Cir. 1975). But in these cases, government witnesses perjured themselves in their direct testimony at trial, that information coming to light after conviction. A new trial has been ordered in such circumstances, even where the prosecutor had not known the testimony given at trial was false, and only discovered it later. But the case at bar does not involve such circumstances, Couri's further misconduct with respect to Plazagal being "merely cumulative or impeaching" on the question of his credibility, *Mesarosh, supra.*

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[8] Gilbert's *Brady* request, quoted at p. 29 of his main brief on this motion, constitutes a verbose but nonetheless general "boiler-plate demand" for "anything exculpatory," *Ostrer v. United States*, 577 F.2d 782, 786 (2d Cir. 1978), *cert. denied*, 439 U.S. 1115 (1979); *see also, United States v. Menghi*, 641 F.2d 72, 74-75 (2d Cir. 1981). The only exception is the specific demand for cooperation agreements, to which the Government responded by disclosing Couri's plea to one count arising out of the Conrac manipulation. Of course, the Government was not in a position to make *Brady* disclosure to Gilbert of Couri's Plazagal plea, since it had not yet occurred.

Finally, Gilbert argues that, since the Government delayed until March 18 before advising his trial counsel of the new revelations concerning Couri, this motion should be regarded as having been made within seven days after verdict, thus triggering the "interest of justice" standard for a new trial in the first sentence of Rule 33. Gilbert relies upon a line of cases in the District of Columbia Circuit for the proposition that "a new-trial motion based on newly discovered evidence made within the seven-day period following verdict--which in federal practice is allowed for such a motion irrespective of its grounds--or, as here, within an extension of that period, is to be measured in terms of the 'interest of justice', and not by the stricter standard available to motions submitted outside that time frame." *United States v. Anderson*, 509 F.2d 312, 327 (D.C.Cir. 1974) (footnotes omitted). The cases cited by the *Anderson* court at 327 n.107, and upon which Gilbert also relies, are *Brodie v. United States*, 295 F.2d 157, 159-160 (D.C.Cir. 1961); *Benton v. United States*, 188 F.2d 625, 627 (D.C.Cir. 1951); and *United States v. Schartner*, 285 F.Supp. 193, 196 (E.D.Pa. 1967). The Second Circuit's cases make no such distinction in the timing of motions for a new trial based on after-discovered evidence, evaluating them all by the standard discussed *supra*, which requires denial of the present motion. Furthermore, the D.C. Circuit cases are entirely different on their facts. *Brodie, Benton* and *Schartner* (the Eastern District of Pennsylvania case cited in *Anderson*) all involved after-discovered evidence demonstrating directly that government witnesses had testified falsely at the trial. That element is not present in the case at bar. In *Anderson*, the D.C. Circuit held that newly acquired evidence "failing as an instance of perjury" and which "could only impinge upon" the credibility of a government witness did

not require a new trial, even under the "interest of justice" standard. 509 F.2d at 328. I accept Gilbert's contention that his motion should be viewed as made within seven days, but reject the motion on its merits.

In sum, the newly discovered evidence underlying Gilbert's motion for a new trial does not rise to the level of materiality required either by Rule 33 or by *Brady*. None of the factual issues Gilbert wishes to explore in an evidentiary hearing is germane to resolution of his motion, which in the light of the foregoing authorities I deny.

Conclusion

The defendant's motions are denied in their entirety.

It is So Ordered.

Dated: New York, New York
July 23, 1981

Charles S. Haight, Jr.
CHARLES S. HAIGHT, JR.
U. S. D. J.